Supreme Court, U.S.
FILED
APR 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1448

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,

v.

DORIS I. SANDBERG,
Respondent.

FIRST AMERICAN BANK OF VIRGINIA, INC., *et al.*,
Petitioners,

v.

PAUL H. WEINSTEIN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

JOSEPH M. HASSETT *
JOHN C. KEENEY, JR.
GEORGE H. MERNICK, III
DAVID G. LEITCH
ALBERT W. TURNBULL
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5643

* Counsel of Record

Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the evidence supported the verdict that the proxy statement contained material misstatements of fact.

2. Whether this Court should decide the causation question left undecided in *Mills* v. *Electric Auto-Lite Co.* despite the fact that petitioners waived the issue, the Court of Appeals did not reach it, there is no conflict in the circuits, and the evidence supported the jury's verdict of causation pursuant to unobjected-to instructions.

3. Whether this Court should review the decision of the Court of Appeals that petitioners waived the third of the questions they seek to present.

4. Whether (a) the Court of Appeals correctly held that petitioners waived the third argument asserted here, and, if the argument was not waived, whether (b) the Court of Appeals properly upheld the verdict.

PARTIES TO THE PROCEEDINGS

Respondents adopt the statement of parties to the proceedings found in the Petition and, pursuant to Supreme Court Rule 29.1, state that no corporate respondent has any parent companies or subsidiaries other than wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

COUNTERSTATEMENT 1

REASONS FOR DENYING THE WRIT 9

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE EVIDENCE SHOWED MISSTATEMENTS OF FACT THAT WERE PROPERLY SUBMITTED TO THE JURY 12

A. The Proxy Statement Falsely Represented That The Board Approved The Merger Because It Offered Minority Stockholders An Opportunity To Achieve A High Value For Their Shares When, As A Matter Of Fact, No Such Determination Had Been Made 12

B. The Proxy Statement Falsely Represented That The Board Relied On An Independent Determination Of The Value Of The Stock When, As A Matter Of Fact, It Did Not 16

II. PETITIONERS CONCEDED THE CAUSATION ISSUE LEFT OPEN IN *MILLS* v. *ELECTRIC AUTO-LITE CO.* AND, IN ANY EVENT, THE JURY'S VERDICT OF CAUSATION WAS SUPPORTED BY THE EVIDENCE 18

A. Petitioners Waived The Question Left Open In *Mills* Both By Admitting That The Proxy Statement Was An Essential Link In The Transaction And By Failing To Object To The Jury Instruction On That Point 18

B. The Evidence Supported The Jury's Verdict That The Proxy Statement Was An Essential Link In The Transaction That Caused Respondents' Injury 21

TABLE OF CONTENTS—Continued

	Page
C. There Is No Need For This Court To Revisit The Causation Question Left Open In *Mills*, Even If It Had Been Presented Below	22
D. The Rule 10b-5 Question Argued By Petitioners Is Not Presented By This Case	24
III. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS WAIVED ANY CLAIM OF ERROR IN THE SUBMISSION OF SEVERAL RELATED MISREPRESENTATIONS TO THE JURY UNDER A SINGLE COUNT AND, IN ANY EVENT, ITS ALTERNATIVE HOLDING THAT THERE WAS NO ERROR IS CORRECT	26
A. The Determination By The Court Of Appeals That Petitioners Waived The Claimed Error Does Not Present An Issue Worthy Of This Court's Consideration	27
B. In Any Event, The Fourth Circuit's Disposition Of This Issue Follows This Court's Decisions	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES:	Page
Basic, Inc. v. *Levinson*, 485 U.S. 224 (1988)	25
Berg v. *First American Bankshares, Inc.*, 796 F.2d 489 (D.C. Cir. 1986)	13, 14
Biesenbach v. *Guenther*, 588 F.2d 400 (3d Cir. 1978)	15
Broehm v. *Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir. 1981)	29
Carden v. *Arkoma Associates*, 110 S. Ct. 1015 (1990)	20
City of Canton v. *Harris*, 109 S. Ct. 1197 (1989)	20
Clayton v. *Skelly Oil Co.*, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,269 (S.D.N.Y. 1977)	24
Cole v. *Schenley Industries*, 563 F.2d 35 (2d Cir. 1977)	24
Dataprobe Acquisition Corp. v. *Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984)	13, 14
Dudley v. *Dittmer*, 795 F.2d 669 (8th Cir. 1986)	29
EEOC v. *Federal Labor Relations Authority*, 476 U.S. 19 (1986)	20
Efros v. *Nationwide Corp.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,077 (S.D. Ohio 1983)	24
Ermar Oil Corp. v. *Getty Oil Co.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,358 (C.D. Cal. 1978)	24
FTC v. *Grolier Inc.*, 462 U.S. 19 (1983)	21
Galloway v. *United States*, 319 U.S. 372 (1943)	2
General Motors Overseas Operations Division of General Motors Corp. v. *The Lichtenstein*, 126 F. Supp. 395 (S.D.N.Y. 1954)	29
Gill v. *Rollins Protective Services Co.*, 722 F.2d 55 (4th Cir. 1983)	29
Golub v. *PPD Corp.*, 576 F.2d 759 (8th Cir. 1978)	15
Gould v. *American Hawaiian Steamship Co.*, 319 F. Supp. 795 (D. Del. 1970)	30
Graver & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949)	10

TABLE OF AUTHORITIES—Continued

	Page
Herskowitz v. *Nutri/System, Inc.*, 857 F.2d 179 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1315 (1989)	17
Heyman v. *Heyman*, 356 F. Supp. 958 (S.D.N.Y. 1973)	23
Kadamian v. *Ladish*, 792 F.2d 614 (7th Cir. 1986)	15
Kas v. *Financial General Bankshares, Inc.*, 796 F.2d 508 (D.C. Cir. 1986)	15
Laurenzano v. *Einbender*, 264 F. Supp. 356 (E.D. N.Y. 1966)	23
Lavender v. *Kurn*, 327 U.S. 645 (1946)	10, 14
Lockspeiser v. *Western Maryland Co.*, 768 F.2d 558 (4th Cir. 1985)	24
Madison Consultants v. *FDIC*, 710 F.2d 57 (2d Cir. 1983)	25, 26
McMurray v. *Deere & Co.*, 858 F.2d 1436 (10th Cir. 1988)	29
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)	*passim*
Radol v. *Thomas*, 534 F. Supp. 1302 (S.D. Ohio 1982), *aff'd on other grounds*, 772 F.2d 244 (6th Cir. 1985)	17
Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955)	12
Santa Fe Industries v. *Green*, 430 U.S. 462 (1977)	15, 25
Schlick v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975)	23
SEC v. *C.R. Richmond & Co.*, 565 F.2d 1101 (9th Cir. 1977)	30
Selk v. *St. Paul Ammonia Products, Inc.*, 597 F.2d 635 (8th Cir. 1979)	24
Smillie v. *Park Chemical Co.*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,891 (E.D. Mich. 1979)	24
Springfield v. *Kibbe*, 480 U.S. 257 (1987)	28
Stedman v. *Storer*, 308 F. Supp. 881 (S.D.N.Y. 1969)	15

TABLE OF AUTHORITIES—Continued

	Page
Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962)	29
TSC Industries v. *Northway, Inc.*, 426 U.S. 438 (1976)	10, 12, 29, 30
United Pilots Ass'n v. *Halecki*, 358 U.S. 613 (1959)	29
United States v. *Johnston*, 268 U.S. 220 (1925)	10
United States v. *Margala*, 662 F.2d 622 (9th Cir. 1981)	26
Wilmington Star Mining Co. v. Fulton, 205 U.S. 60 (1907)	28, 29
Yentsch v. *Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980)	29
STATUTES, RULES AND REGULATIONS:	
15 U.S.C. § 78n(a)	*passim*
Fed. R. Civ. P. 8(e)(2)	29
Fed. R. Civ. P. 10(b)	29
Fed. R. Civ. P. 23	11
Fed. R. Civ. P. 51	20, 27, 28
Va. Code Ann. § 13.1-692.1	7
Va. Code Ann. § 13.1-718(B)(1)	3, 12, 22
12 C.F.R. § 335.212, Item 14(a)	12
17 C.F.R. § 240.10b-5	24, 25
MISCELLANEOUS:	
H. Bloomenthal, *Securities and Federal Corporate Law* (rev. ed. 1990)	23
Folk, *Corporation Law Developments—1969*, 56 Va. L. Rev. 755 (1970)	19
Note, *Loss and Transaction Causation: The Second Circuit Resolves the Causation Controversy in Majority Control Situations*, 22 Wash. & Lee L. Rev. 683 (1975)	19
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986)	10, 11
C. Wright & A. Miller, *Federal Practice and Procedure*	29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1448

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,

v.

DORIS I. SANDBERG,
Respondent.

FIRST AMERICAN BANK OF VIRGINIA, INC., *et al.*,
Petitioners,

v.

PAUL H. WEINSTEIN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

Respondents Doris I. Sandberg and Paul H. Weinstein, *et al.*, (collectively, "respondents") respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Fourth Circuit's decision in these cases.

COUNTERSTATEMENT

Preliminary Statement

None of the three questions argued by petitioners is fairly presented by these cases because none is based on

the *facts* as found by the jury and affirmed by the Fourth Circuit. Contrary to the requirement that the evidence be considered in the light most favorable to the jury's verdict, *see, e.g., Galloway* v. *United States*, 319 U.S. 372, 395 (1943), petitioners' arguments ignore, misstate, or gloss over the evidence accepted by the jury and rely, instead, on factual contentions advanced by petitioners in the trial court and rejected by the jury. Additionally, petitioners' arguments to this Court depart markedly from the positions petitioners urged below, and represent an effort to raise for the first time questions long since waived. Accordingly, respondents' counterstatement of the case is based on the evidence credited by the jury and the issues actually presented to and addressed by the courts below.

Counterstatement of the Case

The Freeze-Out Merger. These cases arise from the efforts of First American Bankshares, Inc. ("FABI"), to eliminate all minority stock interest in First American Bank of Virginia ("the Bank") and acquire for itself the 15% of the Bank's stock it did not already own. Pet. App. 5a.[1] FABI's desire to acquire the minority's stock was based upon a memorandum by its Treasurer showing that the acquisition would significantly increase FABI's earnings and would be profitable if FABI paid $61 a share. JA 1167-69. Although, as the jury found, the minority stock was worth $60 a share, Pet. App. 19a, FABI sought to acquire the stock at $42 a share in a so-called "freeze-out" merger in which FABI, through its wholly owned subsidiary Virginia Bankshares, Inc. ("VBI"), received all of the stock of the Bank and the stock of the minority was converted into a right to receive $42 per share in cash from VBI. JA 692-94, 701-02, 631-32, 646, 1330.

[1] "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari; "JA" refers to the Joint Appendix in the Fourth Circuit.

The Need For A Proxy Statement. Although FABI's ownership of 85% of the Bank's stock was sufficient for stockholder approval of a merger, the merger could not occur unless the Bank's directors issued a proxy statement recommending the plan of merger and called a stockholders' meeting to vote on the merger. Va. Code Ann. § 13.1-718(B)(1); *see* Pet. App. 5a. FABI wanted widespread stockholder support for the merger because it did not want a repeat of the situation that had occurred with its Maryland subsidiary a year earlier. JA 461. There, FABI's proposed freeze-out merger was not consummated because of minority stockholder opposition to FABI's price. The board of the Maryland subsidiary, relying on an independent financial advisor, determined that FABI's price was unfairly low. JA 932, 901. That board did not recommend the merger and FABI was ultimately forced to increase its price by forty percent. JA 853-54.

Thus, in the Virginia transaction at issue here, FABI set out to ensure that the public "would respond favorably to [the $42] price," JA 703-704, and FABI's chairman told the Bank's chairman that the transaction would have to be approved not only by the Bank's board of directors but "would have to go to the stockholders in order for their approval as well." JA 724.

FABI Drafts The Fictional Proxy Statement. The principal responsibility for securing public stockholder approval for the merger at FABI's $42 price was assigned to VBI's President Jack Beddow, who was also an officer and director of FABI and a director of the Bank. JA 695, 927-29. Beddow's first step was to ask *FABI's* counsel to prepare *for FABI* a proxy statement to be issued *by the board of the Bank*—the party on the other side of the transaction—stating that the *Bank's* board had approved and was recommending to minority stockholders a merger in which FABI would acquire all of the minority's stock. JA 800-01, 931. The proxy state-

ment drafted by FABI addressed the two obstacles that had thwarted FABI's efforts with the sister subsidiary. Addressing first the Maryland board's determination that the price was unfairly low, this proxy statement recited that the Bank's directors had voted for and were recommending the merger to stockholders "because it provides an opportunity for the [Bank's] public shareholders to achieve a high value for their shares." JA 1208. No such vote or recommendation had occurred; the Bank's directors did not even learn of the merger until six months later. JA 722-23.

Second, to avert the Maryland experience of the subsidiary board's retention of an independent financial advisor, FABI's draft of the proxy statement it wanted the Bank to issue represented that the price had been determined to be fair to minority stockholders by an independent investment banker. JA 1209. However, even as it was drafting that proxy statement, FABI decided that this time *it* would hire a financial advisor to give an opinion that the $42 price FABI wanted to pay was fair, and then falsely represent that the $42 price was the product of an "independent analysis" by the investment banker. JA 697, 704, 932.

FABI knew that telling an investment banker the price it wanted to pay would compromise the investment banker's independence. JA 676-77. Nonetheless, Beddow told Keefe, Bruyette & Woods ("KBW") FABI's price, and asked if KBW would furnish an opinion that such price was fair. JA 839-40. KBW was willing to give the opinion on the condition that FABI pay $25,000 for the opinion letter and a $75,000 bonus if it succeeded in acquiring the minority stock at the price it wanted to pay. FABI agreed. JA 1170-1173, and KBW issued the opinion letter. Pet. App. 74a-76a.

The opinion letter did not state the basis for its conclusion. Evidence at trial revealed that the letter was not based on an independent analysis of the inherent

value of the stock but was simply the product of KBW's willingness to endorse any price FABI chose above the $32 "market" price, even though KBW recognized that the so-called "market" was a thin one dominated by FABI. JA 980, 991, 810-13, 1182, and that the minority stockholders were not selling into that "market" but were being forced to surrender their shares to FABI. JA 980.

The Bank's Directors Approve The Proxy Statement Without Reviewing It. Through arrangements made by Beddow, KBW made a presentation to a small group of the Bank's directors and stockholders on January 29, 1987. Pet. App. 6a. After Beddow told the group that FABI would not pay more than $42 per share even if an independent advisor concluded that $42 was an unfairly low price, JA 846, 942-43, the group decided not to retain an independent advisor to determine the fair value of the minority-held stock. Pet. App. 6a; *see* JA 1018. The group then drafted a two-sentence statement recommending that the board of directors accept FABI's $42 per share offer. Pet. App. 6a.

At a meeting held on February 12, 1987, the Bank's board adopted resolutions approving the merger and recommending to the minority stockholders that they vote in favor of the $42 per share offer. *Id.* Directors admitted at trial that the reason the board approved the merger was that the directors thought they had no choice and would be removed from the Bank's board by FABI if they did not. JA 851-82, 863, 874-75.

At the February 12, 1987 meeting, the directors also adopted resolutions prepared by FABI's counsel which recited that the Bank directors approved issuance of a proxy statement presented to the meeting. JA 1188-89. In fact, no proxy statement was presented to the meeting. JA 771. Instead, the fictional proxy statement which bore no relation to the actual transaction, JA 805-06, and had been prepared by FABI's counsel, was

sent to stockholders without review or approval by the Bank's board of directors. JA 771-72, 805-06.

The Proxy Statement. The proxy statement issued in the name of the Bank's board repeated the two factual representations described above. These representations were pure fictions when drafted and never became fact. First, despite the facts that the Bank's directors had not determined that the $42 price was a high one, and had approved the merger because they thought they would be replaced if they did not, the proxy statement repeated verbatim the fiction that the Bank's board had approved the merger because it provided an opportunity for minority stockholders to achieve a high value for their shares. Pet. App. 15a; *see* JA 1246, 1208. Second, despite the fact that the Bank's directors had specifically decided not to retain an independent investment banker, and although KBW had not acted independently, the proxy statement represented that KBW's opinion letter was an independent determination as to the fairness of the $42 price. Pet. App. 16a.

This Litigation. After consummation of the freeze-out at $42 per share, respondent Sandberg brought a class action, alleging in Count I that petitioners had violated Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), and, in Count II, that they had breached fiduciary duties under Virginia law. The complaint alleged that the proxy statement was an essential link in the merger transaction and that it omitted and misstated material facts. JA 72-75. Petitioners admitted by answer that the proxy statement was an essential link in the transaction and that "the shareholders were entitled to . . . receive complete, accurate proxy materials . . . ." JA 343.

Class certification having been denied, the case was tried before District Judge Albert V. Bryan, Jr., on behalf of respondent Sandberg individually. The jury was instructed that plaintiff was required to establish that

defendants' conduct proximately caused plaintiff's damages, JA 1117, that plaintiff was required to prove "one or more" of the alleged misrepresentations, JA 1114, and that "if you . . . find that the proxy solicitation itself was an essential link in the accomplishment of the merger transaction, then you are instructed it is no defense that the votes of the minority stockholders were not needed to approve the transaction." JA 1121. Petitioners made no objection to any of these instructions.

The jury returned separate verdicts for the plaintiff on both Counts I and II, determining that all of the petitioners had violated Section 14(a), and that the directors had breached fiduciary duties. Crediting the testimony of respondents' expert that the value of the stock was $60 rather than the $42 merger price, the jury fixed damages at $18 per share on alternative verdicts on Count I (for issuance of a misleading proxy statement found to be an essential link in the merger) and Count II (for breach of fiduciary duty). JA 1330. Thus, Sandberg's entitlement to recover $18 per share in damages will not be affected by any action this Court might take with respect to the federal claim, because she can enforce the alternative judgment against the directors for their breach of fiduciary duties.

Under principles of offensive collateral estoppel, the *Sandberg* judgment was applied in favor of the other respondents, who had filed a separate action after petitioners successfully opposed both class certification and attempts to intervene in the *Sandberg* action. The damages of respondents other than Sandberg totaled $3,292,236. As to Count II, however, the judgment was limited to $2,346,533.34, based on Virginia Code Ann. § 13.1-692.1, which limits the amount of damages that can be imposed on a director for state law violations "in any proceeding." The entitlement of respondents other than Sandberg to this amount will not be affected by any action of this Court with respect to Count I.

The Fourth Circuit's Decision. On appeal to the Fourth Circuit, respondents urged that the controlling issue in the case was whether the plaintiff in a Section 14(a) case must prove that he or she relied on the proxy statement.[2] Affirming the judgments against petitioners in all respects,[3] the Fourth Circuit rejected petitioners' principal argument on the ground that, under this Court's decision in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), reliance is not an element of a private cause of action under Section 14(a).[4] Pet. App. 11a. Instead, the court followed the holding of *Mills* that a plaintiff is required to establish only that there were material misrepresentations and or omissions and that the proxy solicitation itself was an essential link in the accomplishment of the transaction.[5] *Id.* at 13a-14a.

Because petitioners had conceded that the proxy statement was an essential link in the transaction, *id.* at 13a n.1, the Fourth Circuit next addressed the proof of material misrepresentations. *Id.* at 14a. The court affirmed

[2] Petitioners presented their case to the Court of Appeals this way:

> This case presents a simple question for the Court. The question is whether a plaintiff who did not grant a proxy, who admitted she did not rely upon anything in a proxy statement, and who voted against the transaction for reasons unrelated to the proxy statement, can maintain a direct action for damages under Section 14(a) (Fourth Circuit Brief of Appellants First American Bankshares, Inc. and Virginia Bankshares, Inc., at 12).

[3] The Court of Appeals also reversed the district court's denial of class certification, and remanded for entry of an order certifying a class. *See* Pet. App. 8a-11a.

[4] Although the Petition asserts that the court also found it irrelevant that "the minority shareholders had no means of blocking the merger," Petition at 8, examination of the court's opinion shows that this assertion is totally unfounded. Because petitioners never presented any argument to the Court of Appeals on this issue, the court had no occasion to address it.

[5] This much, the court observed, had been recognized by the petitioners in their own proposed jury instructions. Pet. App. 13a n.2.

the jury's finding that the proxy statement omitted and misstated material facts. The court held that the evidence supported a verdict that the representation that the directors approved the merger because it presented stockholders with an opportunity to achieve a high value for their shares misstated the facts. *Id.* at 15a. The directors made no such determination but approved the merger to retain their seats on the board. *Id.* This misrepresentation, the court held, could not be said to be immaterial as a matter of law. *Id.* at 16a. Similarly, the court held that whether "KBW's $42 valuation was something less than the product of a completely independent analysis was a question of fact" and that "[t]he representation in the proxy statement that it was such an independent determination could certainly have been found to be a material misrepresentation." *Id.*

The court found it unnecessary to reach petitioners' argument that four related allegations of material misrepresentations and or omissions that had been submitted to the jury were immaterial as a matter of law. It rejected, for two reasons, petitioners' contention that a new trial would be required if any one of the submitted misstatements and/or omissions was immaterial as a matter of law. First, "the submission of both correct and incorrect factual bases supporting a single theory of recovery is not grounds for reversal of a judgment on a general verdict." *Id.* at 17a. Second, the court held that petitioners' attack on the verdict was precluded by their failure to object to the trial court's instruction that the jury was required to find "one or more" material misstatements or omissions. *Id.* at 17a-18a.

REASONS FOR DENYING THE WRIT

It is clear from comparison of the facts stated above with the statement of facts in the Petition that the parties sharply disagree as to the facts. That disagreement, however, has been resolved in respondents' favor by the jury, and the Court of Appeals has determined that there was ample evidence to support the jury's verdict.

Accordingly, the Petition is essentially an effort to reargue factual issues that have been resolved against petitioners by the jury's verdict. For example, petitioners' Point I is the legal proposition that, where *all the material facts are adequately disclosed*, a plaintiff cannot prevail under Section 14(a) merely by alleging that directors failed to disclose a subjective motive to breach their fiduciary duty, or failed to characterize the disclosed facts in a self-accusatory manner. The Fourth Circuit did not hold otherwise. Petitioners' legal argument is purely hypothetical because it is premised on the tired version of the facts that was rejected by the jury when it found that the proxy statement *misstated and omitted material facts*. The Court of Appeals correctly held that respondents had not shown that there was no evidentiary basis for the verdict.[6] Accordingly, this Court should not grant certiorari on Point I because this Court does not sit to review facts determined by two courts below.[7]

The argument asserted in Point II of the Petition—that the Court of Appeals erred by regarding the proxy statement as an essential link in the accomplishment of the merger—also ignores what took place in the courts below. The Court of Appeals correctly recognized that petitioners conceded that the proxy statement was an essential link in the accomplishment of the transaction. Pet. App. 14a n.2. Petitioners are thus barred from seek-

[6] The jury's verdict could be reversed only upon a showing that there was no evidentiary basis to support it. *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946). *See also TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438, 450 (1976) (determination of materiality peculiarly for the trier of fact).

[7] *Graver & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error"); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts"); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.14 (6th ed. 1986) [hereinafter Stern & Gressman].

ing review of the causation question discussed in footnote 7 of *Mills* v. *Electric Auto-Lite Co.*, *supra*—an issue not even mentioned in petitioners' briefs in the Court of Appeals. Moreover, the evidence established that the proxy statement was an essential link in the accomplishment of the merger, and that the merger injured minority stockholders by converting stock worth $60 into a right to receive $42.

Similarly, the argument raised in Point III of the Petition was expressly found by the Court of Appeals to have been waived at trial and, in all events, challenges only a straightforward application of well-established procedural and evidentiary principles by both courts below.

Finally, this Court's consideration of the federal issues presented in the Petition would have little practical effect on the judgments below. Because the alternative state law judgment is not at issue here, the only consequence even of outright dismissal of the federal issue would be the triggering of a Virginia law limiting the damages recoverable from a director on the state law claim "in any proceeding." Under that limitation, the named respondents still would be entitled to recover some two-thirds of the amount of the federal judgment on the alternative state law judgment. Members of the class, moreover, would be entitled to their full recovery either because the Virginia limitation of liability cannot override litigants' rights under Fed. R. Civ. P. 23 (an issue not considered by the lower courts because no class has yet been certified) or because class members faced with such a limitation on recovery would choose to opt out and file separate proceedings in which they would be entitled to full recovery. Thus, this case would be an inappropriate vehicle for consideration of the issues petitioners seek to raise for the additional reason that any decision on the federal claims would have a limited practical effect on the litigants.[8]

[8] *See Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (this Court does not sit to decide academic questions); Stern

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE EVIDENCE SHOWED MISSTATEMENTS OF FACT THAT WERE PROPERLY SUBMITTED TO THE JURY

The Petition asserts that the Fourth Circuit "held that petitioners were bound to characterize [disclosed] facts pejoratively, even to the point of accusing themselves of harboring wrongful subjective motivations in breach of their fiduciary duty." Petition at 11-12. The Court of Appeals did no such thing, and one searches its opinion in vain for any such holding. One finds instead the court's recital of the materiality standard adopted in this Court's decision in *TSC Industries* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976), recognition that it is peculiarly the office of the finder of fact to make the "delicate assessment of the inferences a 'reasonable shareholder' would draw" from the facts, and a fact-specific application of those well-settled standards to this case. That exercise merits no review by this Court. As demonstrated below, moreover, the Fourth Circuit's decision is not in conflict with decisions from other circuits.

A. The Proxy Statement Falsely Represented That The Board Approved The Merger Because It Offered Minority Stockholders An Opportunity To Achieve A High Value For Their Shares When, As A Matter Of Fact, No Such Determination Had Been Made

A board's reason for proposing a merger is so material a fact to stockholders that Va. Code Ann. § 13.1-718 (B)(1) requires that the directors state their recommendation to the stockholders, and 12 C.F.R. § 335.212, Item 14(a), requires that the reasons for the merger be set forth in the proxy statement. The instant proxy statement represented that the Bank's directors had approved the merger because it offered the minority stockholders an opportunity to achieve a high value for their shares.

& Gressman, *supra* note 7, at 201-202 (Court will not review decision where petitioner would be liable under either state or federal law).

The evidence showed that, in fact, the directors never made any such determination, but approved the merger merely to avoid being replaced. JA 851-52, 863, 874-75; Pet. App. 15a.

The Petition recites—as if it were fact—the reason for the board's recommendation as stated in the proxy statement. Petition at 3-4. The evidence showed, however, that the representation that the directors approved the merger because it offered minority stockholders an opportunity to achieve a high value for their shares was a fiction drafted by the buyer's lawyers as part of the plan to prevent shareholder opposition to an unfairly low price by falsely stating that the board had determined that the price was a high one. The representation that such a determination had been made was clearly an untrue statement of fact at the time it was drafted, and it remained an untrue statement of fact because the determination was never made. That misrepresentation of fact was sent to the Bank's stockholders, in the name of the board, without review or approval by the board. The Court of Appeals—rather than holding that subjective motivations must be revealed—simply rejected petitioners' argument that the evidence did not support a verdict that this was a false statement of material fact.

In this respect, the instant case is exactly like another case in which another Court of Appeals flatly rejected the same argument by the same petitioner. *Berg* v. *First American Bankshares, Inc.*, 796 F.2d 489 (D.C. Cir. 1986). There, as here, FABI relied on *Dataprobe Acquisition Corp.* v. *Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), and similar cases for the proposition that the subjective motivations of the decision-maker are not material to an informed decision by stockholders. FABI there argued that it was not misleading for the proxy statement involved in *Berg* falsely to state that the decision-maker had considered certain factors. The court rejected that argument, holding that "[t]he drafters of the proxy statement could not legitimately attribute to [the decision-maker] factors he

did not actually consider, thereby making [the] decision appear informed, and then shield themselves by arguing that . . . subjective motivations are not material." 796 F.2d at 497.

The court distinguished *Dataprobe* on the ground that the proxy statement at issue there had fully described certain guarantees of employment negotiated by the company's directors and that, therefore, there was no additional need for the proxy affirmatively to announce that the directors and officers preferred one offer over another because of the employment guarantees. 796 F.2d at 496. By contrast, the *Berg* court observed that FABI's proxy statement, after recounting that the decision-maker approved the offer, went on to recount the factors on which that decision was based. Nothing in *Dataprobe* or any other case grants a license to state those factors falsely.

Similarly, in the instant case, petitioners had no license to make a false statement that the directors had made a determination that, in fact, they never made. As in the prior case involving FABI, petitioners here could not legitimately attribute fictional reasons to the Bank's board, thereby making the decision appear informed, and then shield themselves by arguing that the board's true reason for approving the merger was not material.

Petitioners' strained attempt to create a circuit conflict out of the unremarkable and fact-specific decision of the Court of Appeals is based entirely on the false premise that there was no misstatement or omission of material fact in the instant proxy statement. The jury's verdict to the contrary could be reversed only upon a showing that there was no evidentiary basis to support it. *Lavender* v. *Kurn*, 327 U.S. at 653. As shown above, however, there was evidence from which the jury could find not merely a subjective motive to violate fiduciary duty but a false representation of fact.

The Fourth Circuit's decision is not inconsistent with the cases relied on by petitioners, none of which involve, as this case does, a false statement. Petitioners'

cases are typified by *Golub* v. *PPD Corp.*, 576 F.2d 759, 764-65 (8th Cir. 1978). There, the court said that if a proxy statement "fully and fairly sets out such relevant and material facts as would enable a reasonably prudent stockholder to make an intelligent decision" as to how he would vote, a plaintiff may not state a claim under Section 14(a) merely by alleging a failure to disclose that the subjective motivation of the directors was to benefit themselves in breach of their fiduciary duty. Similarly, in *Biesenbach* v. *Guenther*, 588 F.2d 400 (3d Cir. 1978), also relied on by petitioners, the court merely held that "[t]he unclean heart of a director is not actionable, whether or not it is 'disclosed,' unless the impurities are translated into actionable deeds or omissions both objective and external." *Id.* at 402 (quoting *Stedman* v. *Storer*, 308 F. Supp. 881, 887 (S.D.N.Y. 1969)).

Those cases are not in conflict with the decision below because the jury here found deeds and omissions both objective and external—namely, petitioners' dissemination of a proxy statement, unseen by the board in whose name it was issued, that falsely stated that the board had made a determination that—as a matter of fact—it never made. Nor is there a conflict with *Kadamian* v. *Ladish*, 792 F.2d 614, 624 (7th Cir. 1986), where it was not alleged that the reasons given for the merger were false. Unlike all the cases relied on by petitioners, this case involves an affirmative false statement.

That fact also unmasks the error of petitioners' related contention that the decision below applies Section 14(a) of the Securities Exchange Act to no more than a breach of fiduciary duty in contravention of *Santa Fe Industries* v. *Green*, 430 U.S. 462 (1977). As the court pointed out in *Kas* v. *Financial General Bankshares, Inc.*, 796 F.2d 508, 512 (D.C. Cir. 1986), a case relied on by petitioners, *Santa Fe* held only that "a breach of fiduciary duty, absent any element of deception or manipulation, stated no claim under Section 10(b) [but did not] preclude an action under the Securities Exchange Act based on a material nondisclosure or mis-

representation simply because the undisclosed facts involved might also support a breach of fiduciary duty claim." As the Court of Appeals held, this case involved material misstatements.

The facts found by the jury reveal that there is no merit to petitioners' assertion that the decision below "expands the scope of federal proxy regulation to include the entire spectrum of state fiduciary law." Petition at 10. To the contrary, the federal proxy statute was applied here because petitioners issued a proxy statement containing false statements.

B. The Proxy Statement Falsely Represented That The Board Relied On An Independent Determination Of The Value Of The Stock When, As A Matter Of Fact, It Did Not

Once again, the evidence presented to the jury, but ignored by petitioners, shows the error of petitioners' contentions. That evidence showed that the proxy statement falsely represented that the board's recommendation was supported by an independent determination that the minority stock was worth $42 when, in fact, there was no such independent determination. The Bank's board specifically decided not to obtain an independent determination, JA 1018, and FABI destroyed any pretense of independence by KBW when it sought and obtained KBW's agreement to rubber-stamp its $42 price. The evidence permitting the jury to so find included a specific admission by FABI that telling KBW in advance the price it wanted to pay would compromise KBW's independence, JA 676-77, KBW's concession that it had in fact been told in advance the value FABI wanted it to reach, JA 839-40, the grudging concession by FABI's Beddow in front of the jury that he did indeed disclose the requested result in advance of the inquiry, JA 935-36, and proof that KBW made no inquiry into the inherent value of the shares and focused its discussion with the Bank's directors more on the question of how to avoid an adverse public reaction to the $42 price than on determination of the value of the stock. JA 1184.

Moreover, FABI's effort to palm off KBW's rubber-stamp of the price FABI wanted to pay as an independent determination that the price was fair to minority stockholders arose in the context of a transaction in which a fairness opinion was particularly important to minority stockholders as an independent certification that the controlling stockholder's offer was fair to them. *See Herskowitz* v. *Nutri System, Inc.*, 857 F.2d 179, 184 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1315 (1989). The misleading nature of the representation that KBW acted independently was exacerbated by the fact that KBW, contrary to its normal practice, did not state in its opinion letter to whom the $42 price was fair. JA 569-70. Adherence to the usual practice would have required a representation that the price was fair only *to FABI*. *Id.*

The Court of Appeals correctly held that whether KBW acted independently was a question of fact, and that the evidence supported a verdict that it did not. Pet. App. 16a-17a. Petitioners' argument that the misstatement "could not 'have been viewed by the reasonable investor as having significantly altered the "total mix" of information,'" Petition at 19, ignores the evidence as to what the true facts were.[9]

In light of the evidence here of a deliberate effort to portray KBW's blind endorsement of FABI's price as an independent determination of fairness to minority stockholders, there is absolutely no basis for petitioners' argument that the Court of Appeals' fact-specific application of traditional Section 14(a) principles is a "profoundly disturbing" expansion of the law.[10]

---

[9] For example, the Petition glosses over the evidence supporting a verdict that KBW sold its independence with the circumlocution that "KBW had knowledge of FABI's views on the issue of financial fairness." Petition at 17.

[10] Petitioners do not accurately describe the holding of the district court in *Rodel* v. *Thomas*, 534 F. Supp. 1302, 1315 (S.D. Ohio 1982), *aff'd on other grounds*, 772 F.2d 244 (6th Cir. 1985), when they state that it rejected "a claim that the description of an investment banking firm as 'independent' could constitute a material mis-

II. PETITIONERS CONCEDED THE CAUSATION ISSUE LEFT OPEN IN *MILLS* v. *ELECTRIC AUTO-LITE CO.* AND, IN ANY EVENT, THE JURY'S VERDICT OF CAUSATION WAS SUPPORTED BY THE EVIDENCE

Petitioners argue that the Court of Appeals "eliminat[ed] . . . the requirment of causation from the implied cause of action under Section 14(a)" by regarding the instant proxy statement as an essential link in the transaction. Petition at 19-20. Quite to the contrary, it was petitioners themselves who conceded in the trial court that the proxy statement was an essential link in the transaction, and the Court of Appeals had no occasion to do more than take note of that fact because petitioners did not brief the question in the Court of Appeals. Pet. App. 13a n.1. Petitioners' concessions preclude them from seeking this Court's review of the causation question they belatedly seek to present. Moreover, the factual record in the case once again fails to present the issue petitioners frame because the jury found that the proxy statement *was* an essential link in the merger that injured minority shareholders by converting shares of stock worth $60 into a right to receive $42. In any event, there is no need for this Court to consider the *Mills* footnote 7 question.

A. Petitioners Waived The Question Left Open In *Mills* Both By Admitting That The Proxy Statement Was An Essential Link In The Transaction And By Failing To Object To The Jury Instruction On That Point

In *Mills* v. *Electric Auto-Lite Co.*, the Court held that in a private action under Section 14(a), it is not necessary either to show that the defect in the proxy statement "actually had a decisive effect on the voting," 396 U.S. at 385, or that there was any causal connection between "the particular defect in the solicitation materials" and the injury suffered by the plaintiff. *Id.* Instead, the

representation." The court held only that the particular proxy statement at issue there was not misleading.

Court held that causation is established in a private action under Section 14(a) by a showing that the misrepresentation was material and that the proxy statement was an essential link in the accomplishment of the transaction for which the proxy was sought. *Id.* at 384.

While not deciding the question, the Court "hinted rather broadly" [11] that a proxy solicitation is "sufficiently related to the merger" to constitute an essential link, even where management controls enough votes to approve the transaction, "if the management finds it necessary for legal or practical reasons to solicit proxies from minority shareholders." 396 U.S. at 385 n.7.[12]

Petitioners assert that the Court should grant certiorari to resolve the "open issue" of *Mills*' footnote 7, and to hold that the proxy statement below was not an essential link in the accomplishment of the transaction. Petitioners once again ignore the record in this case, which demonstrates that they conceded that the proxy statement was an essential link in the transaction, and failed to object to the jury instruction on the essential link point. For these reasons, the issue they seek to raise is not presented in this case.

Petitioners waived numerous opportunities to assert the issue of which they now seek this Court's consideration. Specifically:

- The complaint alleged that the proxy solicitation was an essential link in the accomplishment of the

[11] Note, *Loss and Transaction Causation: The Second Circuit Resolves the Causation Controversy in Majority Control Situations*, 22 Wash. & Lee L. Rev. 683, 687 n.34 (1975). *See* Folk, *Corporation Law Developments—1969*, 56 Va. L. Rev. 755, 829 (1970) (court "obliquely indicated" that causation test could be met in such circumstances).

[12] Such a result is consistent with the rationale of *Mills* that use of a materially misleading solicitation is itself a violation of a statute enacted to insure "that proxies would be solicited with 'explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.'" *Id.* at 381.

transaction, JA 191, and petitioners so admitted by answer, JA 343, and at trial, JA 820.

• At trial, petitioners' counsel foreclosed this area of inquiry by objecting to a line of questioning on the point because "[t]hat's an uncontested matter." JA 820.

• Petitioners did not object to the trial court's instruction that "if you . . . find that the proxy solicitation itself was an essential link in the accomplishment of the merger transaction, then you are instructed *it is no defense that the votes of the minority stockholders were not needed to approve the transaction*." JA 1121 (emphasis supplied).

• The jury was also instructed, again without objection, that the plaintiff was required to establish that defendants' conduct proximately caused plaintiff's damage. JA 1117.

• Petitioners themselves asked for an instruction submitting to the jury the question whether the proxy statement was an essential link in the accomplishment of the transaction, JA 424-25, 466, thereby recognizing that FABI's voting power did not preclude a finding that the proxy statement was an essential link in the transaction.

• Petitioners' briefs in the Court of Appeals did not so much as cite what is now described as the "famous" footnote 7 of *Mills*.

Petitioners thus have clearly waived any contention as to the absence of causation, and are foreclosed from raising that point here. Federal Rule of Civil Procedure 51, and this Court's practice of requiring presentation of issues to the lower courts in the first instance,[13] prohibit

[13] *Cardes* v. *Arkoma Assocs.*, 110 S. Ct. 1015, 1022 (1990) (refusing to consider question not addressed in first instance by Court of Appeals); *City of Canton* v. *Harris*, 109 S. Ct. 1197, 1203 n.5 (1989) (Court refused to consider claim that was neither passed on by the Court of Appeals nor presented to that court as a distinct ground for its decision); *EEOC* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (cert. dismissed as improvidently granted) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals"); *FTC* v. *Grolier Inc.*, 462 U.S. 19, 23 n.6 (1983) (Court declined to address issue that respondent failed to raise before district court or Court of Appeals).

petitioners from letting the case go to the jury on the admissions and instruction quoted above, and then seeking to raise the point admitted and covered in the instruction on a petition for writ of certiorari.[14]

B. The Evidence Supported The Jury's Verdict That The Proxy Statement Was An Essential Link In The Transaction That Caused Respondents' Injury

Petitioners' argument that "the lower courts in this case have totally overlooked the need to establish how the challenged errors in the proxy statement caused the amount of damages claimed." Petition at 26, is directly contrary to this Court's holding in *Mills* that it is not necessary, in a Section 14(a) case, to show causal connection between "the particular defect in the solicitation materials" and the injury suffered by the plaintiff. 396 U.S. at 385. What is necessary under *Mills* is that the proxy statement was an essential link in the transaction and that the transaction injured the plaintiff. Both of these elements—sometimes referred to by the lower courts as "transaction causation" and "loss causation"—were established by the evidence here. Thus, the causation question recited in the Petition, premised on the purported facts that the proxy statement could not have affected the outcome of the voting *and* that "plaintiff has not demonstrated causation in any other way," Petition at (i), is simply not presented in this case.

[14] Petitioners briefly referred to footnote 7 of *Mills* in the district court when, while not objecting to the court's instruction that "it is no defense that the votes of the minority stockholders were not needed to approve the transaction," JA 1121, petitioners objected to plaintiff's proposed instruction on reliance which, as is clear from the content of the instruction at JA 1132, merely restated the rule of law that this Court *did* decide in *Mills*.

1. Respondents established the causal connection between the merger and their loss by proving that the stock the merger converted into $42 was worth $60. That is exactly what *Mills* requires. 396 U.S. at 388-89.

2. The evidence here also showed that, in fact, the proxy statement was an essential link in the accomplishment of the transaction, thus providing so-called transaction causation. Virginia law required dissemination of of a proxy statement containing the board's recommendation as an absolute prerequisite to accomplishment of the transaction. Va. Code Ann. § 13.1-718(B)(1). Moreover, the evidence showed that for practical reasons, FABI regarded issuance of this proxy statement as necessary to obtain the desired broad shareholder support for the transaction at $42 per share, and thereby to avoid a repeat of the Maryland experience in which stockholder opposition to the price led to the Board's failure to recommend the merger and ultimately forced FABI to increase its price. *See supra*, at 3. Indeed, minority stockholder support for the $42 price was so essential that FABI represented that the merger would not take place without it. JA 724.

C. There Is No Need For This Court To Revisit The Causation Question Left Open In *Mills*, Even If It Had Been Presented Below

Petitioners ask this Court to grant certiorari to establish as a matter of law that a proxy solicitation can never be an essential link in a transaction simply because a party has voting control, no matter how necessary the proxy statement might have been in fact. Under the rule sought by petitioners, those with voting control can issue a materially misleading proxy statement without fear of an action by the very individuals whose response to the proposed merger was manipulated by that misleading proxy statement, even if such manipulation is needed to accomplish the transaction. Petitioners can cite no case endorsing this palpably unjust and incorrect interpretation of the securities laws. Such a holding, the Second

Circuit noted in *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374, 383 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975), "would make the proxy requirements a farce," and ought not to be countenanced.[15]

The lower courts have had no trouble recognizing that there are a variety of factual circumstances in which a proxy statement might constitute an essential link, and have thus held, as in the case cited by this Court in *Mills*,[16] that whether the proxy solicitation is an essential link in the transaction is a question of fact.[17] For example, the Second Circuit in *Schlick*, 507 F.2d at 382, refused to allow dismissal of a Section 14(a) claim despite management control, because minority stockholders may "have recourse to measures other than the casting of proxies" to oppose those who have "the naked strength to consummate a fraudulent transaction" (quoting *Heyman* v. *Heyman*, 356 F.Supp. 958, 967-69 (S.D.N.Y. 1973)), and full disclosure could result in "modification or reconsideration of the terms of the merger by those in control. . . ." *Id.* at 384. As demonstrated, respondents proved just that here.

Petitioners incorrectly imply that *Schlick* and other lower court cases hold that a proxy statement can be shown to be an essential link in the transaction only when accurate disclosure would have provided the basis for a state court injunction against the transaction. Petition at 21. As shown above, however, *Schlick* itself held otherwise. Moreover, the courts have recognized a wide variety of factual settings that establish that a proxy solicitation

---

[15] *See also* 3B H. Bloomenthal, *Securities and Federal Corporate Law* § 11.20[1][b] at 11-108 (rev. ed. 1990) (describing as "sophistry" the argument asserted by petitioners on the footnote 7 question).

[16] *Laurenzano* v. *Einbender*, 264 F. Supp. 356, 361 (E.D.N.Y. 1966).

[17] As noted above, petitioners themselves so recognized by proposing instructions to submit the essential link question to the jury, as the District Court, in fact, did.

is an essential link in a transaction for purposes of so-called Section 14(a) "transaction causation." [18]

In sum, *no court* has held, as petitioners seek, that the essential link inquiry is foreclosed as a matter of law whenever management controls enough votes to approve the transaction. This Court's consideration of the question is not warranted.

D. The Rule 10b-5 Question Argued By Petitioners Is Not Presented By This Case

Petitioners' final argument asserts a need for resolution of an issue that has arisen in certain cases under Rule 10b-5, 17 C.F.R. § 240.10b-5, but which was not raised below and is simply not presented by this case. The cases on which petitioners rely are fundamentally different from this case and the situation described in footnote 7 of *Mills* because, in petitioners' cases, no legal or practical reason required issuance of a proxy statement. Thus, there was no basis for invoking Section 14(a) or its policy of "ensuring that the shareholders are able to make an informed choice when they are consulted in corporate transactions." *Mills*, 375 U.S. at 305.

The plaintiffs in the cases cited by petitioners instead sought relief under Rule 10b-5's proscription against fraud in connection with the purchase or sale of a secu-

[18] *See, e.g., Lockspeiser* v. *Western Md. Co.*, 768 F.2d 558, 562 (4th Cir. 1985) (shareholders may decide to seek remedies such as appraisal rights); *Selk* v. *St. Paul Ammonia Prods., Inc.*, 597 F.2d 635, 638 (8th Cir. 1979); *Cole* v. *Schenley Indus.*, 563 F.2d 35, 39-40 (2d Cir. 1977); *Efros* v. *Nationwide Corp.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,077, at 95,119 (S.D. Ohio 1983) (merger conditioned on receiving vote of majority of minority stockholders); *Smillie* v. *Park Chem. Co.*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,891, at 95,660 (E.D. Mich. 1979); *Ecmar Oil Corp.* v. *Getty Oil Co.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,358, at 93,230 (C.D. Cal. 1978) ("[w]hether the proxy statement was an essential link in the accomplishment of [a] transaction must be determined by the trier of fact"); *Clayton* v. *Skelly Oil Co.*, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,269, at 92,748 n.5 (S.D.N.Y. 1977) (recognizing that adverse publicity might cause change in terms of transaction).

rity. Certain of these Rule 10b-5 cases have required that plaintiff show that truthful disclosure would have provided a means of self-protection. *Madison Consultants* v. *FDIC*, 710 F.2d 57, 64 (2d Cir. 1983). Petitioners cite a treatise for the proposition that this Court should decide a question that has arisen when the plaintiff in such a Rule 10b-5 case cites the possibility of a state court injunction against the transaction as his available means of self-protection. Petition at 27. The particular issue to which petitioners refer is the question of what kind of factual showing must be made in such a case that the state court injunction would have been obtained.

That issue, which was not raised below, is not presented by this case for three reasons.

1. This is a Section 14(a) case governed by the language and purpose of a statute entirely different from Rule 10b-5. This Court has long recognized that causation under Section 14(a) is fundamentally different from that under Rule 10b-5.[19]

2. Although not required to do so, respondents in fact proved an available means of self-protection in the form of evidence that truthful disclosure would have stopped this merger just as it stopped a similar transaction by FABI with respect to a sister subsidiary. Petitioners seek to obscure the significance of this showing with the erroneous implication that the only means of self-protection recognized by the Rule 10b-5 cases is a state court injunction. *See* Petition at 25. To the contrary, the Rule 10b-5 cases relied on by petitioners recognize that stockholders have a variety of "available methods of self-protection." *Madison Consultants*, 710 F.2d at 64. The means of self-protection referred to in these cases

[19] *See, e.g., Mills* v. *Electric Auto-Lite Co., supra*; *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988). The fact that petitioners rely on Rule 10b-5 cases in this Section 14(a) case is swept under the rug in a footnote asserting that "the *Santa Fe* causation analysis extends to Section 14(a) as well." Petition at 26 n.8. The commentaries cited, however, support no such broad assertion, and this Court's decisions most certainly do not.

include request for assistance from the SEC, *id.*, and blocking the transaction by public disclosure of the scheme, *United States* v. *Margala*, 662 F.2d 622, 626-27 (9th Cir. 1981) (cited favorably in *Madison Consultants*).[20]

3. The issue on which petitioners belatedly seek review was never raised below. To the contrary, petitioners tried this case on the question whether the proxy statement was an essential link in the transaction, even to the point of both acquiescing in respondents' jury instruction on the subject and proposing their own instruction submitting the essential link question to the jury.

Whatever the merit or lack of merit of the suggestion that this Court should address the Rule 10b-5 question raised in the treatise cited by petitioners, that question is simply not presented by this case.

III. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS WAIVED ANY CLAIM OF ERROR IN THE SUBMISSION OF SEVERAL RELATED MISREPRESENTATIONS TO THE JURY UNDER A SINGLE COUNT AND, IN ANY EVENT, ITS ALTERNATIVE HOLDING THAT THERE WAS NO ERROR IS CORRECT

Petitioners' third line of attack on the Fourth Circuit's decision is again premised on facts not found in this record. Petitioners ask the Court to decide whether a general verdict may be upheld "when some of the grounds of liability submitted to the jury were invalid." Petition at (i). No court, however, has made any determination that any of the grounds of liability submitted to the jury was invalid. The Fourth Circuit simply found it unnecessary to examine in detail the other misstatements after concluding that the first two false statements were material. Analysis of the others was unnecessary because, as the Fourth Circuit held, the evidence already considered was sufficient to support the single theory of materiality submitted to the jury.

[20] There is thus no legal significance—and the petitioners urged none in either of the courts below—to the fact that a minority stockholder, armed only with petitioners' misleading proxy statement, was unable to obtain a state court injunction. The evidence entitled the jury to find that truthful disclosure would have stopped the transaction without the need to resort to court.

Petitioners claim that a new trial would be required in some other circuits if there were "insufficient evidentiary support" for a verdict of materiality as to any one of the misstatements. The Court should not grant certiorari to review this argument for two reasons. First, as the Court of Appeals held, the argument has been waived. Second, the decision below is correct and does not conflict with this Court's decisions.

A. The Determination By The Court Of Appeals That Petitioners Waived The Claimed Error Does Not Present An Issue Worthy Of This Court's Consideration

The Court of Appeals held that petitioners were barred from raising the asserted error by failing to object to the instruction that plaintiffs were required to prove "*one or more*" of the alleged misrepresentations. Pet. App. 17a-18a.[21] Citing Fed. R. Civ. P. 51, the court said that "[t]he failure to object provides an independent ground to reject defendants' argument." Pet. App. 18a.[22] Thus, to reach the issue petitioners assert, the Court would first have to address the question whether the Fourth Circuit correctly determined that petitioners waived their argument by failing to contest the submission of the case to the jury under this instruction. The waiver question is plainly not an issue worthy of this Court's consideration. Nor have petitioners suggested any reason why this Court should grant discretionary review with respect to a jury

[21] Petitioners themselves proposed an instruction that it was sufficient that plaintiff prove "*an* untrue statement." JA 412, 451 (emphasis supplied).

[22] Thus, contrary to petitioners' attempt to characterize as a "suggestion" the holding that the point was waived, Petition at 29 n.12, it was, in fact, an independent basis for the decision below.

instruction as to which no objection was made.[23] Indeed, the case petitioners cite as one that "directly governs this case," Petition at 28, makes clear that this type of objection must be made before the case is submitted to the jury. *Wilmington Star Mining Co.* v. *Fulton*, 205 U.S. 60, 79 (1907).[24]

B. In Any Event, The Fourth Circuit's Disposition Of This Issue Follows This Court's Decisions

The Fourth Circuit's alternative ruling that the submission of both correct and incorrect factual bases supporting a single theory of recovery would not be grounds for the reversal of a general verdict, Pet. App. 17a, is correct and does not conflict with cases cited by petitioners. Indeed, what the court below said about those cases is equally applicable here: those cases "involve the submission of both incorrect and correct *legal* theories of recovery" under a general verdict. *Id.* (emphasis supplied).

Petitioners misstate *Wilmington Star Mining Co.* when they characterize that case as involving "eight factual claims." Petition at 27. Rather, the case involved multiple *legal* theories of recovery or "counts."[25] When

[23] *See Springfield* v. *Kibbe*, 480 U.S. 257 (1987) (dismissing writ of certiorari as improvidently granted where petitioner did not object to relevant jury instruction and "indeed proposed its own instruction to the same effect").

[24] Having conceded the propriety of the jury instruction requiring a finding only of "one or more" misrepresentations, petitioners nonetheless chastise the trial court for sustaining the verdict against post-trial motions. Petition at 29 n.12. Petitioners cite no authority for their unexplained assertion that the trial court somehow bears responsibility for petitioners' decision to let the case go to the jury under the "one or more" instruction rather than objecting to the instruction or requesting a special verdict. The argument cited from the J.N.O.V. hearing simply came too late under well settled standards that place on the parties the burden to bring objections to the attention of the trial court *before* the jury retires. Fed. R. Civ. P. 51.

[25] *See* Petition at 28 (quoting *Wilmington Star Mining Co.*, 205 U.S. at 79). "A 'count' is a distinct statement of a separate cause

the Court held that a new trial was required on the grounds that one of the counts in the complaint (then called a declaration) was not supported by the evidence, it was doing no more than following the usual rule that a general verdict will be reversed when one of several legal theories on which the verdict might have been based was erroneously submitted to the jury.[26] The Fourth Circuit's decision is entirely consistent with that rule.[27]

The Fourth Circuit's holding that it was unnecessary that each and every fact supporting a single theory be sufficient *by itself* to establish the theory of recovery is particularly appropriate to issues of materiality because materiality depends on the "total mix" of information available to stockholders, *TSC Industries* v. *Northway*,

of action," *General Motors Overseas Operations Div. of Gen. Motors Corp.* v. *The Lichtenstein*, 126 F. Supp. 395, 397 (S.D.N.Y. 1954), and the pleading rules in effect when *Wilmington Star Mining Co.* was decided required each cause of action to be set out in a separate count. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1324 at 466 n.34 (1969) (at common law and under codes, different causes of action had to be separately stated). *Cf.* Fed. R. Civ. P. 8(e)(2) & 10(b).

[26] That same general rule was applied in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962) (in general verdict case, invalidation of conspiracy "theory of liability" necessitated new trial on alternative antitrust theories); and in *United Pilots Ass'n* v. *Halecki*, 358 U.S. 613, 618-19 (1959) (where case submitted to jury on two theories of liability, negligence and unseaworthiness, plaintiff's general verdict set aside and new trial ordered after unseaworthiness theory held invalid).

[27] *See Gill* v. *Rollins Protective Servs. Co.*, 722 F.2d 55, 59 (4th Cir. 1983). *See also McMurray* v. *Deere & Co.*, 585 F.2d 1436, 1444 (10th Cir. 1988) (reversal of general verdict required where jury was erroneously instructed on two legal theories of defense: assumption of risk and abnormal use); *Dudley* v. *Dittmer*, 795 F.2d 669, 673-74 (8th Cir. 1986) (invalidation of some antitrust theories necessitated new trial on others where there was a general verdict and where "each claim . . . involved distinctive legal and factual components"); *Brochu* v. *Ortho Pharmaceutical Corp.*, 642 F.2d 652, 662 (1st Cir. 1981) (fraud and strict liability theories); *Ventach* v. *Texaco, Inc.*, 630 F.2d 46, 59 (2d Cir. 1980) (breach of contract, illegal tying, and price fixing theories).

Inc., 426 U.S. at 449, and thus statements not materially misleading in themselves may become so as part of an overall context that creates a misleading effect.[28] Accordingly, the four other misstatements and omissions at issue here, which were directly related to the two principal misstatements discussed by the Court of Appeals, were required to be read in light of the others.[29]

The "delicate assessments" of the effect of these interrelated misstatements and omissions on the total mix of information "are peculiarly ones for the trier of fact," *TSC Industries* at 450, and the jury's verdict based on the total mix should not be reversed simply because one piece of evidence might not be sufficient, standing alone, to support a verdict. The Fourth Circuit's unremarkable application of these traditional principles does not require review by this Court.

CONCLUSION

For each of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

JOSEPH M. HASSETT *
JOHN C. KEENEY, JR.
GEORGE H. MERNICK, III
DAVID G. LEITCH
ALBERT W. TURNBULL
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5643

* Counsel of Record

Counsel for Respondents

---

[28] *SEC* v. *C.E. Richmond & Co.*, 563 F.2d 1101 (9th Cir. 1977); *Gould* v. *American Hawaiian Steamship Co.*, 319 F. Supp. 795, 809 (D. Del. 1970) ("It is proper to find a proxy statement to have violated [Section 14(a)] if one misstatement or omission influences another, and to find the aggregate 'material'").

[29] *See* Pet. App. 16a-17a n.3 (identifying each of the four additional misrepresentations/omissions).